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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re A.M., et al., Persons Coming Under  
the Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES  
AGENCY,

Plaintiff and Respondent,

v.

CYNTHIA C.,

Defendant and Appellant.

G056761

(Super. Ct. Nos. DP025308-001,  
DP025308A, DP025309-001, and  
DP025309A)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,  
Katherine E. Lewis, Judge. Affirmed.

Clare M. Lemon, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Leon J. Page, County Counsel, Karen L. Christensen and Aurelio Torre,  
Deputy County Counsel, for Plaintiff and Respondent.

No appearance made for the Minors.

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Cynthia C. (Mother) appeals from the judgment terminating her parental rights to her sons A.M. and V.M.<sup>1</sup> The children have been in protective custody for over four years. Three times Mother regained supervised custody (for approximately 20 months) with a family maintenance plan. After the last reunification attempt failed, the court terminated services and determined it was in the children's best interests to be adopted by their paternal grandparents. On appeal, Mother maintains the court erred by failing to apply the parent/child benefit exception to termination provided by Welfare and Institutions Code section 366.26, subdivision (c)(1)(B)(i) (benefit exception).<sup>2</sup> We disagree and affirm the judgment.

## FACTUAL BACKGROUND

### *I. Detention*

In August 2014, the Orange County Social Services Agency (SSA) filed an application for a protective custody warrant regarding then two-year-old A.M. and eight-month-old V.M. due to allegations of neglect. The social worker stated the children needed to be removed from their parents' custody because Mother left them with a friend, who sent the children to live with their maternal grandmother (Maternal Grandmother) for nearly a month. The social worker alleged Mother did not make appropriate arrangements for their care and her whereabouts were unknown. Mother's mental health was unstable and she smoked marijuana and methamphetamine in the children's presence. She was recently arrested for driving a stolen vehicle. Father visited the

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<sup>1</sup> The children's father is not a party to this appeal.

<sup>2</sup> All further statutory references are to the Welfare and Institutions Code.

children on weekends, and he was in the process of seeking full-time custody in the family law court. The social worker reported Father had a substance-abuse related criminal history and was currently on probation. He used marijuana and methamphetamine.

The juvenile court detained the children. SSA placed them with their paternal grandmother (Paternal Grandmother). The court granted Mother and Father supervised visitation.

## *II. Jurisdiction/Disposition*

In the social worker's jurisdictional/disposition report, dated September 18, 2014, she stated Mother admitted to having an unresolved substance abuse problem dating back to when she started using drugs when she was nine years old. Mother, now 24 years old, had not completed a substance abuse treatment program. She maintained there had been adequate provisions for the children at Maternal Grandmother's house.

The social worker recommended the court sustain the petition, declare dependency, and provide family reunification services to Mother and Father. The petition restated the allegations raised in the protective custody warrant. It also alleged Mother self-reported she suffered from depression and engaged in self-injurious behavior, and she did not take her prescribed anti-depressant medication. Mother and Father pled no contest to the jurisdictional petition, and the court sustained it.

One month later, the parents submitted to dispositional findings. The court declared the children dependents of the court, removed them from parental custody, and ordered reunification services. The social worker referred Mother to an inpatient substance abuse program. Her plan included drug testing, a psychological evaluation, counseling, and parenting education.

## *III. Reunification Period*

The social worker filed a report in November 2014, describing positive visits between the parents and the children. Mother missed visitation with the children

approximately once a week (over the past three weeks), and she indicated she relapsed. She had not participated in drug testing nor enrolled in a substance abuse treatment plan.

The social worker's next report, dated April 20, 2015, was prepared for the six-month review hearing. She recommended an additional six months of services. Mother entered a sober living home in November 2014 but was dismissed from the program on January 9, 2015. While residing with her mother, Mother was attending 12-step meetings, participating in counseling, and drug testing. Mother was unemployed and applying for jobs.

Mother's 10 hours of unmonitored visitation with the children each week was going well. Mother acted appropriate during visits and would typically spend time feeding and playing with the children. She displayed age appropriate parenting skills and regularly attended visits.

As for the children, they were "well adjusted and attached" to their caretaker, Paternal Grandmother. The social worker reported the children were affectionate with Paternal Grandmother, who was providing appropriate medical, physical, and emotional care. The court ordered six more months of reunification services.

#### *IV. Interim Review-Trial Visit*

The social worker filed a report in July 2015, stating Mother was cooperating with her case plan services and maintaining her sobriety. In early July, she moved into a residential substance abuse program. This move permitted Mother to have overnight visits with the children. When she lived with Maternal Grandmother, the social worker could not authorize overnight visits due to safety concerns. Mother and her mother had an "unstable relationship," which could trigger a relapse. Mother stated she intended to stay for the entire 18-month program. She had her first overnight visit with the children on June 20, 2015. The social worker indicated she would approve additional

overnight visits and would like the court to authorize a trial visit the end of July 2015. The court authorized the trial visit.

In mid-August, the social worker prepared another interim review report stating the children were thriving and doing well in Mother's care during her trial visit at the residential substance abuse program (Prototypes). The children were attending daycare at the residence facility and had adjusted well to living there with Mother. The staff reported Mother was cooperative and actively participating in services.

#### *V. 12-Month Review Hearing*

In her September 17, 2015, report, the social worker recommended formal return of the children to Mother's custody under family maintenance supervision. She opined Mother had made substantial progress in her case plan, and complied with all court orders, and her trial visit with the children was going well. She stated, "Despite some internal and external stressors during this period of supervision, [Mother] has maintained a positive outlook and continues to learn as much as she can throughout the process." The court agreed with the social worker's recommendation and returned the children to Mother's custody with a plan of family maintenance supervision.

#### *VI. Second Removal-Section 387 Petition*

SSA detained the children three months later (on December 21, 2015), after Mother took the children on a day pass from the program to visit their maternal grandparents to celebrate V.M.'s recent birthday. Mother went to a liquor store and bought alcohol after becoming upset by something her mother said to her. She asked a friend for a ride (with her children) back to Prototypes. On the way, "the friend" stopped at the store and bought Mother additional alcohol. They stopped at a park and continued to drink. Mother became intoxicated. When Mother returned to Prototypes, she was unable to walk and had slurred speech. The children were upset and crying. Mother passed out and was unable to care for the children. The staff reported they were not

licensed to provide child care and a social worker removed the children from Mother's care. SSA filed a section 387 supplemental petition.

In a detention report, filed December 24, 2015, the social worker reported Prototypes lead counselor indicated the facility would support Mother if she wanted to stay in the program. The counselor stated Mother would begin at "Phase One," which was a higher level of supervision. She would not be entitled to day passes. The counselor stated Prototypes would support Mother in any way because relapse was a part of recovery. The Prototypes program manager confirmed Mother could continue her enrollment. The manager was glad Mother wanted to return to the facility rather than give up on her children and return to using drugs. Mother took responsibility for her relapse and promised she was willing to do whatever was needed to regain custody of her children. She remained at Prototypes.

The social worker recommended the children be released to Mother under a Conditional Release to Intensive Supervision Program (CRISP). However, at the hearing, the minors' attorney opposed a CRISP release. The court detained the children out of Mother's care. SSA placed them in the care of Paternal Grandmother.

In the social worker's next report dated January 28, 2016, prepared for the jurisdiction/disposition hearing, she recommended the court sustain the petition, declare dependency, and offer Mother family reunification services. She reported Mother disclosed the December 21 incident was not the first time she drank alcohol while staying at Prototypes. She drank alcohol three times while living there. Mother told the social workers that she had trouble dealing with anger and feelings, which triggered relapses. The social worker believed Mother was genuinely remorseful for the December 21 incident and she wanted to provide good care to her children. She was willing to comply with any additional services and wanted to prove she could be a good parent for her children.

The social worker stated that before the December 21 incident, Mother demonstrated “a significant degree of compliance with her case plan services” and “nearly a year of sobriety.” She noted Mother had not provided sufficient evidence she had adequately mitigated or resolved the issues that initiated these dependency proceedings. “Nevertheless, [Mother] is currently at Prototypes . . . and has shared she feels the recovery home is helping her learn how to better deal with her triggers.” The social worker described Mother’s recent visitation as being positive for the children. “[Mother] displayed affection and attentiveness to her children during their first visit. The children were observed to be filled with joy and excitement while having visits with [Mother]. The children have not expressed any negative comments in regards to [Mother] . . . [and A.M.] has shared with the caregiver that he misses [Mother] and would like to be home with [Mother].”

The social worker noted Paternal Grandmother shared her observation that Mother had become “a better person” the past year. Maternal Grandmother confirmed Mother was loving and caring towards the children. The social worker determined that despite the recent relapse, if Mother continued to comply with her case plan she would reunify with the children. “Relapse is a part of building a strong recovery. Through the incident [Mother] has voiced the need of her continuing to build a strong and supportive environment of her recovery for her and her children.”

The hearing was continued, and in her addendum report dated April 7, 2016, the social worker described positive visits between Mother and the children. Mother’s visitation hours increased from six to eight hours weekly. Mother told the social worker she wanted as many visits as were possible so she could maintain a bond with her children. Paternal Grandmother reported A.M. really missed Mother and would pretend to call her on his toy phone. The children were always excited to see Mother on visitation days. At the end of April, the court sustained the petition, removed the children from Mother’s custody, and approved the social worker’s plan for services and visitation.

## VII. *Second Trial Visit & 24-Month Review Hearing*

In May 2016, the social worker reported Mother was actively participating and making progress with her sobriety. She had not missed any drug tests, and they were all negative. She continued to participate in counseling and take anti-depression medication. The social worker described Mother's many positive visits with the children.

At the end of July, SSA requested a continuance (to defer making a recommendation) because the children were scheduled to begin a 60-day trial visit with Mother. On July 6, 2016, Mother completed the six-month Prototypes program. She transferred to a different Prototypes facility, which offered an 18-month program. Mother was unemployed but was interested in going to school to become a drug and alcohol counselor. She and the children enjoyed two positive overnight visits. The court authorized the trial visit.

The social worker reported the visit went well and the children appeared to be thriving in Mother's care. Mother was meeting their medical, emotional, and physical needs. Because Mother was successfully maintaining her sobriety, the social worker asked the court to continue the hearing until after the 60-day trial visit ended in October. The court agreed.

In early October 2016, the social worker filed a report recommending Mother regain custody of the children under family maintenance supervision. Mother's counselor reported Mother had made significant progress in caring for her children. The counselor reported the children were very energetic "and a handful," but Mother had learned to supervise them at all times and follow through with consequences. The social worker described a meeting she had with Mother and children at the park. She noted the children were clean, well groomed, and dressed appropriately. The children were energetic and playful. A.M. declined to speak to the social worker in private and stated he wanted to stay with Mother. He told the social worker about his friends, teacher, and his future plans. At the park, the social worker saw the boys followed Mother's



directions to return to her when she saw they had started to run away. Mother stated she used a parenting technique of counting, called ““Five Two Five.”” The social worker reported, “The children appeared to be comfortable with and attached to [Mother] by coming to her to get positive attention and their needs met.” The court placed the children in Mother’s care under family maintenance supervision.

A few months later, in mid-December 2016, SSA authorized monthly overnight visits for the children with their paternal grandparents. Mother agreed with having the visits to permit the children to visit Father as long as his parents were present to supervise the children.

#### *VIII. Family Maintenance Review Hearings*

The social worker’s report, dated March 23, 2017, noted Mother remained in transitional housing offered by the Prototypes program. The social worker recommended an additional six months of family maintenance services. She observed the children appeared to be well adjusted and “comfortable with and attached to” Mother. The social worker stated that in the beginning there were some issues with Mother’s level of supervision over the children, but the staff reported she was making progress with her parenting skills.

The social worker opined the following: “[Mother] has made moderate progress with her case plan. [She] continues to test negative for all illegal drugs and alcohol since January 2016. [She] had been participating in individual therapy . . . [and she] has been referred to a . . . therapist to work on her past traumas and relationship issues with [Maternal Grandmother], which was a trigger for the last relapse, as well as her relationship issues with the children’s father. [Mother] had been attending Parent Child Interaction Therapy (PCIT) with [A.M.] to work on bonding and parenting, but it was terminated due to a schedule conflict and [Mother’s] lack of motivation reported by the therapist. [Mother] is attempting to resume PCIT by contacting the therapist.” Based on this report, the court continued the plan of family maintenance supervision. It

amended the plan so as to not require patch and bracelet testing if Mother continued to test through her program.

A few months later, in June 2017, Mother was discharged from her drug program for noncompliance and the court resumed bracelet and patch testing. Mother drank alcohol during a trip to A.M.'s dentist. Mother's pass authorized her to travel by bus, but she drove with Maternal Grandmother, who did not have a license. She asserted the only possible reason for her positive test was that she drank half a can of soda that her mother had been drinking, but she claimed it did not taste like alcohol. When she returned to Prototypes the staff noted her appearance was altered. A quick strip saliva test was positive for alcohol. The social worker noted Mother was coherent and did not have slurred speech on the phone. Mother started contacting inpatient substance abuse programs and housing programs that accepted women and children.

Mother and the children moved to Mercy House, a transitional housing program. At the end of June 2017, the social worker reported Mother was doing well in the new program and she was participating in all the classes offered. Mother's drug tests were negative and she planned to enter a perinatal drug treatment program. The social worker continued to recommend that the children be placed with Mother under family maintenance supervision.

The social worker's September 21, 2017, report recommended an additional six months of family maintenance services. Mother and the children were residing at Mercy House but needed to find housing by October 8. Mother was on a waitlist for a "Section 8 Housing voucher through the Family Unification Program." The social worker observed the children were being well cared for. Mother was meeting their medical, educational, and emotional needs, and she used appropriate parenting techniques.

The social worker reported A.M. (now five-years-old) stated he liked living with Mother at "the new place" and was comfortable in Mother's care at Mercy House.

A.M. also indicated he liked to visit his grandparents and father because he could go to Chuck E. Cheese. Mother told the social worker she was concerned about A.M. having anger issues and they were working with the PCIT therapist to address this. V.M., now three-years-old, was too young to tell the social worker about his situation, but she observed he appeared to be comfortable living at Mercy House and both children were doing well in Mother's care.

The social worker reported Mother stated she was "happy and grateful to have the children with her" and noted the case plan required a lot of work. Mother stated she nevertheless kept a positive attitude and discussed the need to "expand natural support." The paternal grandparents were helpful by babysitting the children on weekends, which allowed her time to work. However, they lived in Riverside and Mother did not have anyone nearby to assist her with the children. For this reason, Mother agreed an additional six months of reunification services was appropriate.

The social worker concluded her report by noting Mother had tested negative for illegal drugs since January 2016, except for one positive result in June 2017 (causing her termination from the Prototypes program). Mother participated in individual therapy and PCIT to work on bonding and parenting skills. She continued to attend 12-Step meetings and participated in all aspects of her case plan. She found employment at a fast food restaurant. The social worker opined, "the family needs additional [f]amily [m]aintenance [s]ervices in order for [Mother] to show her ability to remain sober and care for the children outside of [an] inpatient program or transitional housing with structure." The court agreed with the social worker's recommendation.

The social worker's next report, dated January 4, 2018, indicated Mother and the children (now six and four years old) moved into a two-bedroom apartment in Costa Mesa. The court granted Mother's request to be relieved of her bracelet testing requirement. Mother was working approximately 27 hours per week at the restaurant to support her family. She was compliant with her case plan by attending perinatal program

twice a week, testing negative for drugs, and participating in individual and PCIT therapy. The social worker surmised, “Although [Mother’s] life can be stressful at times, trying to balance caring for the children, work, and services outlined in the case plan, [she] has been able to manage her responsibilities as a single parent.”

In early February 2018, the social worker reported A.M. stated he liked living with Mother and his brother at their apartment without any other families. He continued to enjoy visits and going to fun places with his paternal grandparents and Father. V.M. stated he liked having his own room. The social worker noted both children were doing well under Mother’s care and were attending school. She reported Mother was also very happy to have permanent housing. She worked hard and was maintaining a positive attitude. Mother stated she no longer thought about drinking alcohol or using drugs because it was not worth the consequences of losing her children. Mother reported she was looking forward to having the dependency case closed, but would be fine if the case remained open longer to ensure the family would be fine without additional support. The social worker recommended additional family maintenance services “in order for [Mother] to show her ability to remain sober and care for the children” while living independently for the first time.

By the end of February, Mother had advanced to the final stage of the perinatal treatment program. She continued to attend therapy and test negative. Mother’s therapist told the social worker that Mother was busy with her job and the children. She had organized child care and back up babysitters if the paternal grandparents were unavailable. The therapist reported Mother was no longer depressed and she realized she wanted to be a mother and raise her children, who were “challenging and fun.” The therapist noted Mother’s relationship with V.M. had improved significantly and she was “grateful for the help she received.”

The social worker made several unannounced visits with the family. She observed the children were well cared for, with plenty of food and clothing. Although

the residence was cluttered, she did not observe any safety hazards. The social worker reported that at the last visit she noticed two empty cans of beer in the outside balcony area. Mother denied drinking and explained she was collecting cans to recycle. However, the social worker saw a large bag of non-alcoholic cans inside the apartment. Mother agreed to submit to a drug test, but at the time of the report the result was not yet available.

The social worker filed an addendum report on March 6, 2018, recommending termination of the dependency proceedings with exit orders. The drug test was negative. She wrote, “A concern in regard to [Mother’s] alcohol consumption has been resolved.” The social worker recommended the following: “[F]ull legal and physical custody to [Mother]. [She] has demonstrated her ability to remain sober and provide adequate care for her children by meeting their physical, medical, and emotional needs. [Mother] has developed a support system, including her sponsor, the paternal grandparents, and her colleagues from work. [She] has been self-sufficient by maintaining a job and a safe place to live with her children.”

#### *IX. Third Removal*

At the March 6, 2018, review hearing, the minors’ counsel asked the court to remove the children from Mother’s custody. She argued, “This case came in almost four years ago because of Mother’s drug use. [Methamphetamine] being one of her drugs of choice. . . . She just had a positive test on [February 26, 2018]. [¶] She was supposed to test on Monday. She didn’t go to the test because she had a doctor’s appointment. I don’t know of a doctor’s appointment that takes an entire day to attend[,] which sets off serious red flags for me that this wasn’t an isolated incident. [¶] Additionally, Mother will not accept responsibility for the fact that she relapsed and she used. [She] denies it and said she simply drank cranberry juice. . . . [¶] It appears that in the almost four years of services she has learned nothing and hasn’t been able to treat her addiction. And we are in the same place today that we were in when the case came in almost four years ago.

[¶] We removed at that point because the children weren't safe in her home and I don't believe they're safe in her home at this time.”

Mother's counsel argued Mother was committed to her sobriety and met with her sponsor the day after testing positive. Mother indicated she would be willing to go back on the drug patch and keep the case open to prove she is sober. SSA requested the court continue family maintenance services to Mother and its prior recommendation of closing the case was no longer appropriate. SSA believed it was possible to ensure the children's safety while in Mother's care by requiring random drug testing and treatment.

The court expressed disappointment about Mother's relapse and said it was also concerned that Mother missed the next scheduled drug test, denied using drugs, and made excuses. The court determined Mother would retain custody of the children under intense supervision, with Mother testing four times a week and the social worker making a minimum of two unannounced visits per week. It continued the hearing to the end of the month.

Approximately one week later, on March 15, 2018, SSA filed an ex parte report that Mother tested positive for methamphetamine the day after the March 7 hearing and missed a test scheduled for March 8. Mother had told the social worker the last time she used drugs was on March 4. On March 13, the paternal grandparents and Father reported Mother looked different and they were concerned.

On March 19, minors' counsel filed a section 388 petition requesting the court remove the children from Mother's custody. The court ordered a hearing on the matter to be heard the same day as the scheduled review hearing. Mother agreed to leave the children with Paternal Grandmother pending the hearing.

On March 16, 2018, the social worker filed a report changing the recommendation. She determined the children should be removed from Mother's custody and the matter set for a section 366.26 permanency hearing (hereafter .26 hearing). Mother told the social worker she was overwhelmed and stressed out. She was

meeting with her sponsor, drug testing, and attending counseling. Mother and the social worker discussed the distinction between adoption and legal guardianship. Mother initially wanted Paternal Grandmother to adopt the children, but when she learned this plan meant she would lose her right to visit the children, and that legal guardianship could lead to reunification. She indicated she would prefer a guardianship arrangement.

Mother's therapist wrote to the social worker and said Mother was very emotional about her relapse and was facing new difficulties trying to co-parent the children with Father. He was being emotionally and physically abusive, pressuring Mother to be in a relationship with him. Father broke into Mother's apartment, and choked her in front of the children when she was driving the car. Mother was afraid to seek a restraining order because she believed it would negatively impact her relationship with Paternal Grandmother, who could restrict her contact with the children. The social worker opined this stress and fear clouded Mother's judgment and she did not report the domestic violence to SSA or other authorities.

The hearing for the section 388 petition and review hearing took place on March 26, 2018. The court considered testimony from Mother and the social worker before granting the section 388 petition. The court terminated services, removed the children from Mother's custody, and scheduled the .26 hearing.

#### *X. .26 Hearing*

The social worker prepared a report for the .26 hearing, dated July 16, 2018. She recommended terminating parental rights and a permanent plan of adoption. She discussed the status of each child, stating A.M. was a healthy and happy child, who liked to play and watch cartoons. He easily made friends at school. His kindergarten teacher stated six-year-old A.M. was a socially well-adapted child and a joy to have in her classroom. She noted the paternal grandparents were very involved in his education.

The social worker reported that when A.M. was removed from Mother's care in March, and placed with his paternal grandparents, he frequently cried for Mother

and said he wanted to go back with her. She noted, “More recently, the caregiver reported that [A.M.] no longer cries for his mother and rarely asks/talks about her or wanting to go back to her.”

As for four-year-old V.M., the social worker stated he was developmentally on target, energetic, happy, and alert. He attended half-day preschool. He appeared happy and well adjusted in his placement with paternal grandparents.

In this report, the social worker also included past written summaries of all prior visits between Mother and the children, dating back to September 2014. She noted current visitation was limited to eight hours of supervised visitation that took place twice a week. During a visit in April 2018, Paternal Grandmother stated visits were going well and A.M. cried for his mother frequently. V.M. occasionally cried. Mother telephoned the children every day to talk. The social worker met privately with A.M., who stated he liked living with his grandparents but wanted to go back to Mother because he missed her. He liked visiting with her. When she met with V.M., she described him as restless and mostly replied, “I don’t know” to her questions.

The social worker reported on a visit she observed in early May 2018. She learned from the caregiver that Mother spoke with the children once per day, and Mother telephoned multiple times per day but the caregiver and children “cannot always be available.” Paternal Grandmother stated A.M. would become upset if V.M. did not want to speak with Mother on the phone. She asked if Mother was allowed to make video calls. When the social worker asked if she had concerns about that type of call, Paternal Grandmother replied, “No, it’s just that she keeps going on sometimes.”

Paternal Grandmother believed Mother was making things more difficult for the children by giving them items to remind them of her. For example, she gave A.M. a teddy bear and told him to name it Mommy or her first name. She provided the children her shirt to keep with them. She encouraged A.M. to “talk to the stars” because she would be talking to them at night as well. Paternal Grandmother saw that A.M. talks



to the stars. Paternal Grandmother believed these actions made “sense to some degree” because A.M. was more attached to Mother than V.M. She was concerned Mother’s conduct could negatively impact V.M. The social worker instructed Paternal Grandmother to consult with the therapist.

Paternal Grandmother told the social worker that A.M. no longer cried for Mother and transitioned well at the end of visits. The social worker spoke individually and privately with both children. V.M. showed her the stuffed animals and toys Mother had given him. He talked about school and indicated he was doing fine in his placement. When she asked A.M. how he was doing, he replied, “it’s going to be okay.” In response to further questions about what that meant, A.M. said he did not know. He described visits with Mother as fun. He liked playing video games at the visitation center. A.M. reported school was going well. He stated he was worried about Mother. He stated, “Mommy told me that she cries in the dark.”

Both children were referred to counseling due to their exposure to domestic violence and substance abuse. In June, the therapist reported the children did not need counseling services. The therapist told the social worker that when she spoke with the children about their recent removal, A.M. was more verbal about the events than V.M. In addition, A.M. stated he missed Mother and “he would be okay as long as he can see her.” A.M. did not appear to be distressed and stated he was “fine under the care of his grandparents and he [was] used to living with them.”

In June, the social worker observed another visit between Mother and the children. She learned Mother telephoned the children every day and their calls lasted approximately 15 minutes. Paternal Grandmother stated the children were happy to see Mother at A.M.’s kindergarten graduation. The social worker met with the children privately. A.M. said he was going to miss kindergarten. When asked about his visits, A.M. told the social worker he saw Mother on Wednesdays and Fridays and described the places they met. A.M. stated he wanted to see Mother “every day.” He was still worried

about Mother, and when asked why, he said, “I don’t know.” V.M. agreed when the social worker asked if his paternal grandparents were taking good care of him. He said he liked going to preschool and playing with his friends.

The social worker also noted Mother’s patch testing funding was terminated. She repeatedly tested positive for methamphetamine from April 4, 2018, to May 11, 2018. She also tested positive on one occasion for THC and on a different patch for opiates.

The social worker summarized what transpired at the Child and Family Team (CFT) meeting held at the end of May 2018. The first topic was the placement needs of the children. The parties determined the children were doing well in their placement and at school. There was concern “regarding the impact of children changing placements” and the children were scheduled to begin counseling. The second topic was visitation, and the reports all indicated visits with both parents were going well and the parents were appropriate. There was a concern that at a recent visit A.M. tried to choke Mother and then V.M. mimicked the action by choking his brother. Over the past two weeks, A.M. had tantrums and used bad language during visits with Mother.

The third topic was permanency options. It was noted the children were deemed adoptable and the paternal grandparents were scheduled to attend training at the Permanency Option Planning class (P.O.P.). There were several back up plans if this relative placement failed, including Mother’s friend “Trisha.” There was concern paternal grandparents would give Father unauthorized contact with the children based on past incidents. Finally, the social worker commented, “Children reportedly love parents and [are] attached to them.” Mother’s sobriety date from methamphetamine was April 28, 2018, and marijuana May 26, 2018. She was employed, had housing, transportation, and support from a friend. She was participating in counseling and enrolled in an alcohol and drug outpatient program. Father’s sobriety from alcohol started in March 2018. He resided in a sober living home and “evangelizes for the sober living home” in lieu of

employment. He was drug testing at the home. At the end of the meeting, the participants outlined the following goals: (1) placement or adoption by Trisha; (2) placement with paternal grandparents; and (3) SSA to continue to assess recommendation of adoption versus legal guardianship.

The social worker noted the paternal grandparents attended the P.O.P. and indicated they would like to adopt the children. They were “willing to maintain relationships between the children and both parents, which would include face-to-face visits.” Paternal Grandmother stated she would be comfortable having Mother visit at her home if she were there to supervise. “The caregiver stated that ‘she is always going to be their mom’ but [they] would like to adopt [the children] to provide permanency.” The paternal grandparents were attending parenting classes.

The social worker concluded her .26 hearing report by noting there were no issues regarding visitation. Both parents had maintained regular contact with the children. Mother had the children in her care under family maintenance services two times, for a total of 20 months. Father never had custody of the children but visited the children (except during periods of incarceration). “Despite their relationship with the children, [SSA] assesses that the benefits of adoption will outweigh loss of regular contacts with the birth parents. Since 2014, the children have been moved around due to failed [f]amily [m]aintenance. Even during the period of [f]amily [m]aintenance, the children and [Mother] moved around often due to [Mother’s] relapse and unstable housing situations. In addition, both parents appear to continue to struggle with their addictions as evidenced by their repeated relapses . . . . Furthermore, the . . . prospective adoptive parents recognize the children’s relationship with their birth parents and are willing to maintain contacts with them after adoption is finalized. [¶] Due to the aforementioned, [SSA] assesses that adoption is in the best interests of the children . . . and will provide them with the highest level of permanence and stability. Although, their parents maintained regular contact . . . termination of parental rights will not be

detrimental to the children and the benefit of adoption will outweigh possible loss of regular contacts with the birth parents. The parents continue to suffer from addiction to alcohol and/or illegal drugs despite the services they have received for the last four years. The caregivers are willing to maintain contact with the birth parents and are in [the] process of mediation for post-adoption contract through Consortium for Children.”

The court held a hearing on July 16, 2018, where the minors’ counsel asked that Trisha not be allowed to supervise Mother’s visits because there was a child abuse investigation involving her. The court ordered SSA to find a different supervisor. That same day, Father filed a section 388 petition requesting return of the children to himself or Mother, and the reinstatement of services. The court continued the matter to August, ordering the section 388 petition would be heard in conjunction with the .26 hearing.

The social worker filed an addendum report before the hearing. She described the events relating to the child abuse investigation involving Trisha. The children were playing in the pool by themselves and V.M. began to panic when he went to the deeper side of the pool and thought he was drowning. Trisha went into the pool to retrieve him. When a paternal aunt arrived later to pick up the children she thought V.M. looked dazed and asked the children what had happened. The paternal aunt took the children to the emergency room. It was determined V.M.’s lungs were clear and he was discharged. The social worker spoke with Trisha, who explained the children had floaties on their arms and did not drown. She said the children ate ice cream after the pool incident and looked fine. Mother confirmed this version of the events.

Two days later, the social worker spoke privately with each child. A.M. told the social worker a similar story about the pool incident. When asked how he felt about living with his grandparents for a long time, A.M. said he did not feel good about it because “I wanna live with my mommy.” A.M. stated he would live with his grandparents if he could not live with Mother. V.M. stated he swallowed lots of water and got scared because he could not swim. He recalled having floaties on his arms.

V.M. could not decide who he wanted to live with. He stated it would be fine to live with paternal grandparents for a long time. At the end of July, the Consortium for Children mediator reported she could not move forward with mediation because they ““were unable to get all parties to join.”” The mediator could not provide more details because the proceedings were confidential. She added not all the parties would sign the agreement to start a mediation process.

The social worker reported she spoke again with the children in early August 2018. A.M. complained his first day of school in the first grade was tiring. He stated he liked visiting with Mother and Father and he also enjoyed having his own room at the paternal grandparent’s home. V.M. stated he also liked going to school. When asked about visits with Mother, V.M. replied he hugs and plays with Mother. Mother still contacted the children on the telephone, but she could no longer call every day because she worked late. It was reported the children were ““fine”” after visits, but there was one visit A.M. cried when the visit ended. Paternal Grandmother stated the children did not ask or talk about either parent when they were home with her.

The social worker asked Paternal Grandmother about mediation. She stated she did not sign anything because she and the parents already had an agreement “to keep in touch.” Paternal Grandmother stated she would allow either parent to visit the children at her home as long as they were sober and acted appropriately with the children.

At the combined section 388/.26 hearing, Father testified regarding his petition. The court denied the petition concluding he had not shown a change of circumstance or that modification was in the children’s best interests.

At the .26 hearing, the court heard testimony from the social worker and Mother. Mother argued the court should implement a permanent plan of legal guardianship instead of adoption. Father’s counsel joined in this argument. The minors’ counsel asked the court to follow the recommendation of the SSA and the social worker to terminate parental rights. She argued the benefit exception did not apply because

while it was clear both parents loved their children “tremendously” and consistently visited them, the children were young and had “the majority of their childhood ahead of them.” She noted V.M. had spent half of his life outside of his parent’s care and A.M. was not in Mother’s custody for a third of his life. Thus, during significant portions of their lives, the parents had not been caretakers nor filled a parental role. She noted the needs of the children included stability and permanency, which could be achieved through adoption. She pointed out the parents gave emotional testimony about why they believed parental rights should not be terminated but their statements focused on what they would lose, not the children’s best interests.

The court ruled the children were adoptable and selected the permanent plan of adoption. The court stated it was clear the parents and children love each other and the parents will be “devastated” if their rights are terminated. The court explained, “But the question, and my focus has to be on, will the kids suffer if the parental bond is terminated? And, yes, they will definitely suffer some. But will their suffering be so significant, it outweighs the positives that can come from the stability of adoption? [¶] And stability is a big issue in this case because of the procedural [history of this four-year case] that I just laid out. The kids have bounced back and forth between [Paternal Grandmother and Mother’s] custody since they were two and seven months old. And, that causes a lot of chaos and confusion for little people. [¶] And, because of that, two separate attempts at family reunification, two separate attempts at family maintenance. . . . [There was] confusion [for] the children, who’s going to provide for me? Who’s going to take care of me?”

## DISCUSSION

### *I. Applicable Legal Principles*

The .26 hearing takes place after a juvenile court has terminated reunification services, and consequently, the focus of the dependency proceedings shifts to the needs of the child for permanency and stability, and specifically to determine the

best interests of the child. (*In re J.C.* (2014) 226 Cal.App.4th 503, 527 (*J.C.*)). If the child is adoptable, there is a strong preference for adoption over the alternatives of guardianship or long-term foster care. (*Id.* at p. 528.) “Because a parent’s claim to such an exception is evaluated in light of the Legislature’s preference for adoption, it is only in exceptional circumstances that a court will choose a permanent plan other than adoption.” (*In re Scott B.* (2010) 188 Cal.App.4th 452, 469; see § 366.26, subd. (c)(1)(B) [court “shall terminate parental rights” if minor likely to be adopted unless termination would be detrimental to child under one or more statutory exceptions].)

“‘[C]hildren have a fundamental independent interest in belonging to a family unit [citation], and they have compelling rights to be protected from abuse and neglect and to have a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child.’ [Citation.] Adoption gives a child the best chance at a full emotional commitment from a responsible caretaker. [Citation.]” (*J.C.*, *supra*, 226 Cal.App.4th at p. 527.)

Accordingly, “[O]nce the court determines the child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1). [Citations.]” (*In re S.B.* (2008) 164 Cal.App.4th 289, 296-297 (*S.B.*)). “Section 366.26, subdivision (c)(1)(B)(i), provides for one such exception when ‘[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.’” (*J.C.*, *supra*, 226 Cal.App.4th at p. 528.)

“The exception does not require proof the child has a ‘primary attachment’ to a parent or the parent has ‘maintained day-to-day contact’ with the child. [Citation.] [¶] The exception’s second prong requiring that ‘the child would benefit from continuing the [parent-child] relationship’ means that ‘the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.’ [Citation.] The juvenile court ‘balances

the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer.’ [Citation.] ‘If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.’ [Citation.]” (*In re C.B.* (2010) 190 Cal.App.4th 102, 123-124 (*C.B.*).)

“‘The exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond. The age of the child, the portion of the child’s life spent in the parent’s custody, the “positive” or “negative” effect of interaction between parent and child, and the child’s particular needs are some of the variables which logically affect a parent/child bond.’ [Citation.]” (*C.B.*, *supra*, 190 Cal.App.4th at p. 124.) “The significant attachment from child to parent results from the adult’s attention to the child’s needs for physical care, nourishment, comfort, affection and stimulation. [Citation.] The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.] The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

## II. *Standard of Review*

We assess the court’s section 366.26 findings for sufficiency of the evidence. (*C.B.*, *supra*, 190 Cal.App.4th at pp. 122-123) “We do not reweigh the evidence, evaluate the credibility of witnesses, or resolve evidentiary conflicts. [Citation.] The judgment will be upheld if it is supported by substantial evidence, even though substantial evidence to the contrary also exists and the trial court might have reached a different result had it believed other evidence. [Citation.] [¶] Substantial evidence must be of ponderable legal significance. It is not synonymous with ‘any’



evidence. [Citation.] The evidence must be reasonable in nature, credible, and of solid value. [Citation.]” (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.)

### III. Analysis

In this appeal, Mother compares herself to the father in the *S.B.* case who also had “an emotionally significant relationship” with his child. (*S.B.*, *supra*, 164 Cal.App.4th at p. 298.) She notes her children have lived with her for over half of their lives, they miss her, they are excited to see her, and they were bonded to her with a strong, positive, and emotional attachment. She focuses on the undisputed evidence, contained in many of the social worker’s reports, that A.M. consistently stated he needed to see Mother and wanted to live with her. He missed her terribly when they were apart.

We agree the *S.B.* case is instructive. The appellate court reversed an order terminating the father’s parental rights, concluding the juvenile court erred in finding the parent-child relationship exception did not apply. (*S.B.*, *supra*, 164 Cal.App.4th at pp. 293, 301.) The court reasoned the father had “maintained regular, consistent and appropriate visitation with S.B. throughout the dependency proceedings.” (*Id.* at p. 298.) They had “an emotionally significant relationship.” (*Ibid.*) The father had been S.B.’s primary caretaker for three years, and when she was removed from his custody, he immediately sought treatment for his drug addiction and complied with every aspect of his case plan. (*Ibid.*) There was also evidence “S.B. loved her father, wanted their relationship to continue and derived some measure of benefit from his visits.” (*Id.* at pp. 300-301.) In addition, the parties submitted testimony regarding a bonding study conducted by a psychologist. He testified that due to a “fairly strong” bond, “there was a potential for harm to S.B. were she to lose the parent-child relationship.” (*Id.* at p. 296.) The appellate court concluded that “[b]ased on this record, the only reasonable inference is that S.B. would be greatly harmed by the loss of her significant positive relationship with [the father].” (*Id.* at p. 301.)

“The same appellate court that decided . . . *S.B.* subsequently stated in a different case: ‘The *S.B.* opinion must be viewed in light of its particular facts. It does not, of course, stand for the proposition that a termination order is subject to reversal whenever there is “some measure of benefit” in continued contact between parent and child.’ [Citation.]” (*C.B.*, *supra*, 190 Cal.App.4th at p. 125.)

In this case, there is no dispute A.M. loved Mother and wished to continue contact with her. He repeatedly vocalized his wish to live with Mother, which was significant demonstrative evidence that it would be in his best interest to maintain a relationship with her. As for V.M., there was less direct evidence about his feelings for Mother due to his very young age, but from his conduct it can reasonably be inferred he also benefited from the relationship. V.M. was comfortable and happy while in her custody. He displayed affection towards her. There was certainly evidence both children viewed Mother as having a parental role in their lives.

However, there are some significant differences between this case and the circumstances described in the *S.B.* case. In our view, the most relevant distinction is the lack of the same expert testimony, or at a minimum a bonding study, demonstrating detriment if the parent/child relationship was terminated. For the appellate court in *S.B.*, the parent’s submission of unbiased expert evidence tipped the scales when it came time to weigh the strength, quality, and benefit received from the parent/child relationship against the child’s potential overall well-being in a permanent home with adoptive parents.

Moreover, it should not be overlooked the father in *S.B.* “complied with ‘every aspect’ of his case plan.” (*S.B.*, *supra*, 164 Cal.App.4th at p. 298.) When *S.B.* was removed from the father’s care, he “immediately recognized that his drug use was untenable, started services, maintained his sobriety, sought medical and psychological services, and maintained consistent and regular visitation with *S.B.*” (*Ibid.*) Father, a Vietnam veteran, suffered from combat-related posttraumatic stress disorder and was in

poor physical health. These health-related disabilities, not drug relapses, “impeded his ability to care for S.B. full time.” (*Id.* at p. 294.) The court stated, “His devotion to S.B. was constant, as evinced by his full compliance with his case plan and continued efforts to regain his physical and psychological health.” (*Id.* at p. 289.)

In contrast, Mother was unable to maintain sobriety throughout these dependency proceedings and there were times when her addiction overshadowed her devotion to A.M. and V.M. The children once watched Mother drink alcohol to the point where she lost consciousness. Mother’s relapses meant the children had to endure additional time living in, and moving between, residential substance abuse facilities. Moreover, these children repeatedly endured the false hope of permanency through successful reunification with Mother, suffering immense instability and emotional harm each time they were removed from Mother’s supervised custody. Unlike the father in *S.B.*, Mother’s efforts do not show the same level of commitment to the best interests of her children.

The trial court recognized Mother had a parental bond with her children, and concluded they “will definitely suffer some” detriment if the relationship were to be terminated. The court determined any detriment was outweighed by the “positives that can come from the stability of adoption.” It explained lack of stability was “a big issue” during this four-year dependency case and the constant moving causes unnecessary “chaos and confusion” for young children. The court determined the procedural history of the case, with two separate attempts at family reunification, had left the children feeling uncertain about who would take care of them. It was time to provide them with a sense of permanency and stability.

This determination is amply supported by the record. In the most recent social worker’s report, there was evidence A.M. was adjusting to his new circumstances without showing obvious signs of detriment. Seven-year-old A.M. stopped crying for Mother and rarely asked about her or living with her. A.M. indicated he would be fine

living with his paternal grandparents. As aptly noted by minor's counsel, the children have "the majority of their childhood ahead of them" and their needs for stability and permanency can be achieved through adoption. Whereas a legal guardianship plan presents the children with the possibility of additional years of placement instability and ongoing litigation. After evaluating all the evidence presented, we conclude there was substantial evidence supporting the court's conclusion adoption was in the children's best interests. "While the court had to consider each child's wishes, it was required to act in each child's best interest (§ 366.26, subd. (h)(1)) and a child's wishes are not necessarily determinative of the child's best interest [citation]." (*C.B.*, *supra*, 190 Cal.App.4th at p. 125.)

Mother notes the court cannot rely on an assumption Paternal Grandmother will allow future contact between Mother and the children. (*C.B.*, *supra*, 190 Cal.App.4th at p. 128.) We agree. If the benefit exception is established "the court cannot nevertheless terminate parental rights based upon an unenforceable expectation that the prospective adoptive parents will voluntarily permit future contact between the child and a biological parent, even if substantial evidence supports that expectation. The purpose of the parent-child relationship exception is to protect the parent-child relationship when its continuation is more beneficial to the dependent child than a permanent plan of adoption and, in such case, a court cannot leave the protection of such a relationship dependent upon the hoped-for goodwill of the prospective adoptive parents." (*Id.* at pp. 128-129.) However, the potential for future contact was only mentioned as part of the social worker's final report. The court did not say anything suggesting it found this fact relevant. There is nothing in the court's ruling that indicates it gave this information any weight in deciding on a permanent plan for A.M. and V.M.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

FYBEL, J.